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U.S. Department of Justice

Environment and Natural Resources Division

DJ#90-11-2-1109

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June 22, 1999

VIA U.S. MAIL

TO: Counsel of Record

Re: United States v. City of Albion, Michigan et al., Civ. No. 1:97CV1037, (W.D. Mich.)-- Motion to Enter Proposed Consent Decree.

Dear Counsel:

Enclosed are copies of the following documents sent to W. Francesca Ferguson, Assistant United States Attorney for the Western District of Michigan, for filing in the above-referenced action:

1. United States' Motion to Enter Proposed Consent Decree ("Motion");
2. United States' Memorandum in Support of Motion to Enter Proposed Consent Decree ("Memorandum"); and
3. Certificate of Service.

If there are any questions regarding the enclosures, please do not hesitate to contact me. Again, thank you for your efforts and cooperation in this matter.

Sincerely,

Lois J. Schiffer
Acting Assistant Attorney General
Environment and Natural Resources Division

By: Francis J. Biros

Francis J. Biros
Trial Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF ALBION, MICHIGAN, Defendant/Third-Party Plaintiff, Counter-Defendant, Counter-Claimant, v. COOPER INDUSTRIES, INC. and CORNING, INCORPORATED, Third-Party Defendants, Counter-Claimants and Third-Party Plaintiffs, v. DECKER MANUFACTURING CORPORATION, Third-Party Defendant, Counter-Claimant and Cross-Claimant.	Case No. 1:97-CV-1037 Hon. David W. McKeague Mag. Joseph G. Scoville

UNITED STATES' MOTION TO ENTER PROPOSED CONSENT DECREE

The United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), hereby moves this Court to enter the proposed Consent Decree in this action under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. § 9601 et seq. ("CERCLA"). The Consent Decree was lodged with this Court on March 22, 1999. The Plaintiff United States, the Defendant City of Albion, Michigan

(the "City") and three Third-Party Defendants named in this action, including Cooper Industries, Inc. ("Cooper"), Corning Incorporated ("Corning") and Decker Manufacturing Co. ("Decker") entered into the proposed Consent Decree relating to the Albion-Sheridan Township Landfill Superfund Site located in Albion, Sheridan Township, Michigan (the "Site").

The United States Department of Justice published notice of the lodging of this Decree on April 21, 1999, and provided an opportunity for public comment on the proposed Consent Decree for a period of thirty days. (64 Fed. Reg. 19551). The comment period has expired, and the United States received no comments on the proposed Decree.

WHEREFORE, for the reasons stated in the accompanying memorandum, and because the settlement is fair, reasonable and consistent with the purposes of CERCLA, the United States requests the Court to enter the proposed Consent Decree as a final judgment.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF ALBION, MICHIGAN, Defendant/Third-Party Plaintiff, Counter-Defendant, Counter-Claimant, v. COOPER INDUSTRIES, INC. and CORNING, INCORPORATED, Third-Party Defendants, Counter-Claimants and Third-Party Plaintiffs, v. DECKER MANUFACTURING CORPORATION, Third-Party Defendant, Counter-Claimant and Cross-Claimant.	Case No. 1:97-CV-1037 Hon. David W. McKeague Mag. Joseph G. Scoville

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO ENTER PROPOSED CONSENT DECREE

I. INTRODUCTION

The United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), submits this memorandum in support of its motion to enter the proposed Consent Decree that would resolve the United States' civil claims against the City of Albion, Michigan (the "City") and three Third-Party Defendants named in this action, including Cooper Industries,

Inc. ("Cooper"), Corning Incorporated ("Corning") and Decker Manufacturing Co. ("Decker").

This is a civil action pursuant to Sections 106(b), 107(a), and 113(g)(2) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C. §§ 9606(b), 9607(a), and 9613(g)(2) brought by the United States in connection with enforcement and response actions by the EPA at the Albion-Sheridan Township Landfill Superfund Site located in Albion, Sheridan Township, Michigan (the "Site"). The Settling Defendants have begun implementing the remedial action under the Consent Decree. The proposed Consent Decree was lodged with the Court on March 22, 1999.

II. THE PROPOSED CONSENT DECREE

Under the proposed Consent Decree, Cooper and Corning (collectively, the "Settling RA Defendants") would be obligated to finance and perform the remedial action at the Site as specified in EPA's Record of Decision ("ROD"), at an estimated cost of $2.6 million. The City and Decker (collectively, the "Settling O&M Defendants") would be obligated to finance and perform the operation and maintenance of the remedial action at the Site as specified in the ROD, at an estimated cost of $0.538 million. The Settling O&M Defendants would be required to reimburse EPA's future response costs at the Site in the amount of $200,000. In addition, the City would be required to

reimburse the Superfund $400,000, and Decker would be required to reimburse the Superfund $250,000, in separate obligations, toward the United States' past costs at the Site.

The Site is an inactive municipal landfill located approximately one mile east of the City of Albion in Sheridan Township, Calhoun County, Michigan. The Site, which covers approximately 18 acres, was widely used for both municipal and industrial waste disposal from approximately 1966 to 1981. In the early 1970s, the landfill accepted metal plating sludges, including insoluble hydroxides and carbonates. Other materials, such as paint wastes and thinners, oil and grease, dust, sand and dirt containing flyash and casting sand, also have been disposed of at the Site. Site activities resulted in contamination of soil and groundwater with hazardous substances. The Site will be remediated under the proposed Consent Decree. The remedial action to be implemented by the Settling RA Defendants consists of the following actions: (1) removal and off-Site treatment of surface wastes; (2) construction of a landfill cap; (3) installation of passive gas collection system; (4) installation of groundwater monitoring wells; (5) institutional controls, including Site security, on- and off-Site; and (6) construction of stormwater/infiltration retention basins. The operation and maintenance to be implemented by the Settling O&M Defendants consists of the following actions: (1) operation and maintenance

of the cap and other remedy components installed; (2) long-term (30 years) monitoring of groundwater; (3) institutional controls on certain adjacent parcels of land; and (4) maintenance of Site security.

The proposed Consent Decree supersedes, and embodies the requirements of, a unilateral administrative order ("UAO") issued to the four Settling Defendants by EPA on October 11, 1995, and a previously lodged Consent Decree with Decker providing for the reimbursement of the $250,000 to the United States. Under the proposed Consent Decree, the United States agreed to move the Court for leave to withdraw the consent decree between the United States and Decker lodged with the Court on May 27, 1998. 63 Fed. Reg. 29752 (June 1, 1998). The United States filed its unopposed motion for leave to withdraw previously lodged consent decree with Decker on or about March 22, 1999. Also, under the proposed Consent Decree, EPA agrees to withdraw a unilateral administrative order issued to the City, Decker, Cooper and Corning on October 11, 1995, within fourteen days after entry of the proposed Consent Decree by the Court.

As set forth in the Decree, in consideration of the obligations of the Settling Defendants, the United States covenants not to sue or to take other civil or administrative action relating to the Site under CERCLA Sections 106 or 107 or under Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973.

In accordance with section 122(d) of CERCLA and 28 C.F.R. § 50.7 the United States Department of Justice gave the public notice of the lodging of the proposed Consent Decree on April 21, 1999, and provided an opportunity to comment on the Decree for a period of thirty (30) days. 64 Fed. Reg. 19551 (April 21, 1999). CERCLA section 122(d) provides that the Attorney General may "withdraw or withhold consent" to a proposed settlement if comments disclose "facts or considerations" that indicate that a proposed settlement is "inappropriate, improper, or inadequate." 42 U.S.C. § 9622(d). The comment period has expired, and the United States has received no comments on the proposed Consent Decree. The United States has determined that the Consent Decree is fair, reasonable, and consistent with the purposes of CERCLA. Accordingly, the United States moves that this Court approve and enter the Consent Decree as a final judgment.

III. JUDICIAL REVIEW OF CONSENT DECREES IN CERCLA CASES

Approval of a consent decree is a judicial act that is committed to the informed discretion of the trial court. Madison County Jail Inmates v. Thompson, 773 F.2d 834, 845 (7th Cir. 1985); see also United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1435 (6th Cir. 1991). Courts, however, exercise this discretion in a limited and deferential manner, as the process of negotiation is normally not subject to judicial

review. United States v. Jones & Laughlin Steel Corp., 804 F.2d 348 (6th Cir. 1986); see also Mars Steel v. Continental Ill. National Bank and Trust, 834 F.2d 677, 681 (7th Cir. 1987); Airline Stewards v. American Airlines, 573 F.2d 960, 963 (7th Cir. 1978), cert. denied, 439 U.S. 876; United States v. Mid-State Disposal, Inc., 131 F.R.D. 573, 577 (W.D. Wis. 1990).

In general, public policy strongly favors settlements of disputes without litigation. Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir.), cert. denied, 429 U.S. 862 (1976); Donovan v. Robbins, 752 F.2d 1176-77 (7th Cir. 1985). Settlements conserve the resources of the courts, the litigants, and the taxpayers and "should . . . be upheld whenever equitable and policy considerations so permit." Aro v. Allied Witan Co., 531 F.2d at 1372; E.E.O.C. v. Hiram Walker & Sons, 768 F.2d 884, 888-89 (7th Cir. 1985) cert. denied, 478 U.S. 1004 (1986).

"The law generally favors and encourages settlements." Metropolitan Housing Development Co. v. Village of Arlington Heights, 616 F.2d 1006, 1013 (7th Cir. 1980). Among other things, settlements avoid wasteful litigation and expense. Airline Stewards v. American Airlines, 573 F.2d at 963. The courts have recognized that settlements are particularly useful for the government because they "maximize[] the effectiveness of limited law enforcement resources" by permitting the government to obtain compliance with the law without lengthy litigation.

United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975); see also United States v. Hooker Chemical & Plastics Corp., 540 F.Supp. 1067, 1079-80 (W.D.N.Y. 1982).

Public policy favoring settlements "has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." United States v. Cannons Engineering, 899 F.2d 79, 84 (1st Cir. 1990); see also, City of New York v. Exxon Corp., 697 F.Supp. 677, 692 (S.D.N.Y. 1988) (presumption of validity for settlement negotiated by agency whose mission furthers public interest). Moreover, "the district court must refrain from second-guessing the Executive Branch." Cannons Engineering, 899 F.2d at 82; United States v. Nicolet, Inc., 30 Env't Rep. Cas. 2061, 2064 (E.D. Pa. 1989)("the balancing of competing interests affected by a proposed consent decree . . . must be left, in the first instance, to the discretion of the Attorney General.")(citations omitted); see also United States v. Hercules, 961 F.2d 796, 798 (8th Cir. 1992).

In reviewing CERCLA consent decrees, in particular, courts determine "not whether the settlement is one which the Court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute." Cannons Engineering,

899 F.2d at 84; see also United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1435 (6th Cir. 1991); Kelly v. Thomas Solvent Co., 717 F.Supp. 507, 516 (W.D. Mich. 1989); United States v. Seymour Recycling Corp., 554 F.Supp. 1334, 1337-38 (S.D. Ind. 1982); H.R. Rep. No. 253, Pt. 3, 99th Cong., 1st Sess. 19 (1985). The Cannons Engineering court noted that the legislative history supporting the Superfund Amendments and Reauthorization Act of 1986,

> makes pellucid that, when such consent decrees are forged, the trial court's review function is only to satisfy itself that the settlement is reasonable, fair and consistent with the purposes that CERCLA is intended to serve. H.R. No. 253, Part 3, 99th Cong., 1st Sess. 19 (1985). Reasonableness, fairness, and fidelity to the statute are, therefore, the horses which district judges must ride.

899 F.2d at 85. See United States v. Hercules, 961 F.2d at 800; United States v. Akzo Coatings of America, 949 F.2d at 1426; United States v. Conservation Chemical Corp., 628 F.Supp. 391, 400 (W.D. Mo. 1985).

Thus, Congress and the courts have fashioned a three-part test under which a court should evaluate a proposed CERCLA settlement. This three-part test consists of a review for: (1) fairness, (2) reasonableness, and (3) consistency with CERCLA's goals. As demonstrated below, the proposed settlement meets the three-part test for review of this CERCLA Consent Decree, and it should be entered by the Court.

IV. THE CONSENT DECREE IS FAIR, REASONABLE, AND CONSISTENT WITH THE GOALS AND PURPOSES OF CERCLA

The proposed Consent Decree is fair, reasonable, and consistent with the goals and purposes of CERCLA. This settlement was reached after extensive, arms-length negotiations, conducted forthrightly and in good faith with the parties to the settlement. See Cannons Engineering, 899 F.2d at 86. As such, the settlement process was procedurally fair.

In addition, the Consent Decree is both substantively fair and reasonable. Substantive fairness requires the Court to consider "concepts of corrective justice and accountability: the party should bear the cost of the harm for which he is legally liable." Cannons Engineering, 899 F.2d at 87. That is, the apportionment of liability should correlate to a parties' culpability for contamination at a Site. In this case, the parties, individually, are undertaking remedial action and reimbursing past costs commensurate with their individual culpability at the Site. The criterion of reasonableness requires examination of the technical adequacy of the remedy, adequate compensation to the public, and whether settlement, as opposed to litigation, is appropriate. Cannons Engineering, 899 F.2d at 89-90.

The Settling Defendants will implement a remedial action at the Site selected by EPA under the ROD that will be protective of public health and the environment. Terms of

settlement with the Settling Defendants are consistent with EPA's Model CERCLA RD/RA Consent Decree. See 60 Fed. Reg. 38,817 (July 25, 1995). The United States has not received any comments or objections to the Consent Decree in response to its invitation for public comment. Moreover, the United States is recovering a substantial portion of its response costs incurred and to be incurred at the Site and settlement in this case is preferable to litigation since the Site cleanup will proceed expeditiously. Therefore, the settlement is reasonable.

Finally, the settlement is consistent with the public interest and furthers the goals of CERCLA in important respects. The Consent Decree avoids the need for the use of Superfund monies for implementation of the remedy, and the Superfund can be used to respond to releases, or threats of releases, of hazardous substances at other sites. See Kelley v. Thomas Solvent Co., 717 F.Supp. at 518; Conservation Chemical Co., 628 F.Supp. at 403. Thus, the settlement assists the government in cleaning up the environment under CERCLA. Also, the Consent Decree avoids extensive multi-party litigation, and thereby saves precious time and resources for all parties and the Court. The small compromised amount of recovery by the United States is justified taking into account the risk of litigation and full, expeditious implementation of the remedial action by the Settling Defendants. Accordingly, the Court should enter the Consent Decree.

V. CONCLUSION

For the foregoing reasons, the United States submits that the proposed Consent Decree is fair, reasonable and consistent with the goals of CERCLA, and, therefore, requests that the Consent Decree be approved and entered by the Court. A signature line has been provided at page 81 of the Decree.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22d day of June 1999, copies of the foregoing United States' Motion to Enter Proposed Consent Decree; Memorandum in Support of United States' Motion to Enter Consent Decree; and this Certificate of Service were deposited with U.S. Department of Justice mailroom personnel to be sent by first class U.S. Mail, postage prepaid, to the following counsel:

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